IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-809

THOMAS BRENNAN, et al.,

Petitioners,

v.

KEVIN ARMSTRONG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners, pursuant to Supreme Court Rule 24, respectfully submit this reply to the Respondents' Brief in Opposition (R. Br.).

SUMMARY STATEMENT

Respondents do not answer petitioners' primary argument in their Petition for Certiorari (Pet.) that a conclusion of system-wide, intentional segregation is contrary

to the District Court's specific findings of fact unless the Milwaukee School Board's good faith use of a racially neutral neighborhood school policy is unconstitutional *per se*. Respondents do not challenge the District Court's specific findings that racial imbalance in Milwaukee's schools is due to residential patterns and the neighborhood school policy, and no case exists which includes both such specific findings and a conclusion of intentional segregation.

Instead, respondents attempt to divert attention from the "unexplained hiatus" between the District Court's conclusion and its specific findings of fact by relying upon general racial statistics and tenuous inferences from random District Court findings. General statistics and tenuous inferences do not eliminate specific court findings. Statistics disclosing racially imbalanced schools are mere reflections of racially imbalanced neighborhoods,[1] just as statistics disclosing numerous racially balanced schools[2] reflect integrated neighborhoods.

Although neither the District nor Circuit Courts expressly held Milwaukee's neighborhood school policy unconstitutional *per se*, that is the inescapable effect; the decisions cannot be sustained under any other theory, for they patently conflict with *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, U.S. , 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977), *Washington v. Davis*, 426 U.S. 229 (1976) and *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

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1 As of 1970, about 90% of the City's black population resided in a contiguous area 65-75% black overall, "ranging from about 40% on the periphery to 75-80% and more near the center" (A.42).

2 *See* A.108 – as of the 1972-73 school year, 37 of 155 schools were between 10% and 67% black.

If it is permissible to infer system-wide segregative intent in the face of the findings of the District Court here, the results of future school litigation will be, as Mr. Justice Powell observed in *Keyes*, 413 U.S. at 233, "fortuitous, unpredictable and even capricious," for surely school officials everywhere could hope for no more than to convince a court that they have consistently and uniformly adhered to a neighborhood school policy in the good faith belief that it provided the best educational opportunity for all students regardless of race.

Because the decision of the Circuit Court is of singular importance to every neighborhood school system throughout the United States, it must be reviewed by this Court. Petitioners do not ask this Court to review the evidence to determine if the District Court's findings of fact, as affirmed, were correct. As petitioners rely upon the express findings of the District Court, respondents' attempted invocation of the "two court rule" (R.Br. 4) is without merit.

I. RESPONDENTS FAIL TO REBUT THE ARGUMENT THAT THE LOWER COURTS HELD MILWAUKEE'S NEIGHBORHOOD SCHOOL POLICY UNCONSTITUTIONAL *PER SE*.

Fair consideration of this Petition requires a careful reading of the entire lower court findings of fact. Among those findings are that (a) petitioners uniformly and consistently adhered to a neighborhood school policy adopted decades before there were substantial numbers of black pupils in the school system (1919), in the good faith belief that this best promotes quality education for all pupils, regardless of race, (b) this policy was of decisive importance in all decisions concerning how and where students would be educated, (c) decision alternatives which would have produced greater racial balance in the schools were not adopted because inconsistent with the neighborhood school policy, (d) racial residential concentration exists in

Milwaukee, (e) the evidence would not support a finding that either racially imbalanced schools or government action caused the racial residential concentration, and (f) schools presently having student bodies 70% or more nonwhite are the result of the interaction of the neighborhood school policy and present racial residential patterns (Pet. 9-11; A.58-59, 132).

These findings are specific, direct and clear. They are based on peculiarly local conditions and circumstances and should be given great weight by appellate courts.[3] Yet, the District and Circuit Courts found petitioners guilty of system-wide segregative intent.[4]

The best proof that a neighborhood school policy has been held unconstitutional *per se* and an affirmative racial balance duty imposed, is to ask the question: What else could petitioners conceivably have hoped to prove at trial other than what the District Court expressly found? Having convinced the District Court of the just cited findings, and others similarly favorable, what else could petitioners have done?

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3 Respondents observe that " 'great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances.' " (R.Br. 19). Petitioners agree, but note that (1) they, not respondents, rely on the non-ultimate findings of fact made by the District Court, (2) findings of consistent, uniform, good faith adherence to a neighborhood school policy should preclude a conclusion of unconstitutionality nation-wide, regardless of local conditions or circumstances, and (3) nation-wide, cases must be decided on the basis of evidence presented in the courtroom rather than on intuition or non-specific feelings.

4 The general, racial statistical findings of the District Court do not support respondents' position. Under *Davis*, the fact that the schools are not racially balanced does not, standing alone, support a conclusion that petitioners were guilty of segregative intent. Certainly if racial statistics alone do not support such a conclusion, the addition of the factor of "good faith adherence" makes such an inference impermissible.

The District Court's answer to these questions, as affirmed, was to require petitioners to show that in the case of every policy decision, they acted affirmatively to promote racial balance. For example, the District Court concluded:

> "In Milwaukee, none of these [petitioners'] decisions ever resulted in any significant or noticeable degree of desegregation in the school system, and practically all of them resulted in greater segregation.
>
> * * *
>
> "The actions of Milwaukee school officials can be usefully contrasted with those of the school system in Grand Rapids, Michigan. In upholding the trial court's decision in favor of the school authorities in that case, the Court of Appeals placed reliance on certain steps taken to advance desegregation and to prevent further segregation.
>
> * * *
>
> "In contrast, Milwaukee school authorities were in this case not able to point to one thing they had done to prevent segregation or to desegregate the schools."[5] (A.129-130)
>
> "The record indicates that the school authorities always had a nondiscriminatory explanation for their acts.
>
> * * *
>
> "These and similar explanations on an isolated basis seem reasonable and at times educationally necessary. In and of itself, any one

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5 As found by the District Court, petitioners did in fact adopt programs to improve racial balance where they did not destroy the neighborhood school policy, e.g., an affirmative solicitation program to increase black attendance at Milwaukee Tech, the City's one city-wide school (A.98), staff profiling so as to build integrated teaching staffs (A.76-77) and the open transfer program (A.8, 67,68). While the open transfer program may be classified as a departure from the neighborhood school policy, the fact that such transfers were permitted only when space was available with first priority going to students who desired to attend their *neighborhood* school (A.68) discloses that the program was neighborhood school policy consistent.

> act or practice may not indicate a segregative intent, but when considered together and over an extended period of time, they do. . . . *It is hard to believe that out of all the decisions made by school authorities under varying conditions over a twenty-year period, mere chance resulted in there being almost no decision that resulted in the furthering of integration.*" (A.125-126) (emphasis added).[6]

The Circuit Court's reliance on the "most segregative option" concept (A.18) is likewise an imposition of an "affirmative duty;" it is deficient as a matter of law. *See* pp. 10-11, *infra*. To require that an otherwise racially neutral, geographic student assignment policy affirmatively take race into account is to hold that neutral policy unconstitutional *per se*.

II. RESPONDENTS APPLY IMPROPER LEGAL TESTS.

Although respondents and the Circuit Court each recite the magic words "totality of relevant facts"[7] it is clear that the actual legal tests applied are those of (a) racially disproportionate impact and (b) affirmative duty to integrate – the same tests most recently condemned in

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6 The District Court misunderstands probability theory. In a school system in which there is a great degree of racial residential concentration, and in which school authorities adhere in good faith to a neighborhood school policy, "chance" should be expected to produce few decisions with positive racial balance effects. Indeed, racially imbalanced schools are the inevitable result of continued adherence to a racially neutral neighborhood school policy in a system which becomes racially residentially concentrated.

7 A more apt description of the analyses of the District Court, the Circuit Court and respondents is selective potpourri of inferences. *See, e.g.*, respondents' reliance on inferences at pp.9-11 of their Reply Brief.

Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, where this Court reiterated that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[8] 45 U.S.L.W. at 4077.

In *Arlington Heights*, this Court identified and discussed seven subjects of proper inquiry in determining whether a racially discriminatory intent or purpose exists. Analysis of the seven subjects in terms of the instant case brings into clear focus the absence of such intent or purpose. The seven subjects of inquiry are (45 U.S.L.W. at 4077-78):

(1) Statistical impact of official action;

(2) The historical background of the challenged decision;

(3) The specific sequence of events leading up to the challenged decision;

(4) Departures from the normal procedural sequence;

(5) Substantive departures;

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8 Both lower courts, in effect, violate the racially disproportionate impact rule by inferring segregative intent from petitioners' failure to show that student racial balance was improved by their neighborhood school policy decisions. The Circuit Court repeats the error with respect to teachers:

> "It could further *have been inferred* that teacher assignments not governed by the collective bargaining agreement were not made in accordance with racially neutral principles. *Teacher imbalance existed before the transfer provision was adopted.*" (A.17) (emphasis added).

The Circuit Court's conclusion is clear: the fact of prior racial statistical imbalance of teachers is alone sufficient to justify an inference of discriminatory purpose.

(6) Legislative or administrative history, especially where there are contemporary statements by members of the decision making body, meeting minutes or reports; and

(7) Testimony of members of the decision making body concerning the purpose of the official action.

The decisions challenged by respondents involve the adoption and consistent application of a neighborhood school policy. When each of the seven factors are applied to petitioners' decisions over the years, no racially discriminatory purpose is disclosed:

(1) The pupil racial imbalance of the Milwaukee schools is a direct "result of the interaction of the neighborhood school policy and present racial residential patterns" (A.59). As the District Court concluded that the racial makeup of the schools did not cause racial residential concentration (A. 132), petitioners' decisions had no disparate, statistical impact.[9]

(2) The historical background of the neighborhood school policy in Milwaukee set forth in District Court

9 While the District Court acknowledged the absence of a "direct statistical relationship" between boundary changes and the racial percentages of schools involved in those changes, it nevertheless drew an adverse inference therefrom due to a "short-term impact" on the timing of student racial change (A. 49-50). Such an inference is improper. Additionally, with respect to respondents' citation to statistics concerning faculty racial imbalance (R.Br. 3), the facts are that most schools with predominantly black student populations had predominantly white faculties (A. 109).

findings does not disclose any discriminatory intent. *See, e.g.*, Pet. 8-11. The policy's adoption in 1919, long before there were a significant number of blacks residing in the district, and the good faith adherence thereto since that time for sound educational reasons without regard to race, indicate a nondiscriminatory history.

(3) Nothing in the record or the District Court's findings identifies, with respect to any challenged decision, a sequence of events suggesting discriminatory intent.

(4) No claim has been made that petitioners ever departed from normal decision making procedures with respect to any challenged decision.

(5) Throughout all the years at issue in this case, petitioners departed in only one instance, the open transfer policy, from a pure neighborhood school policy. The purpose of that departure was to enhance racial integration (Pet. 28-29; A.8, 67, 68).[10] The District Court's finding that all policy decisions conformed with the neighborhood school policy is not refuted by respondents. Indeed, the District Court found that policy alternatives which would have improved racial balance were not adopted because of inconsistency with the neighborhood school policy (A.59).

(6) The District Court's findings concerning the history of the neighborhood school policy indicate that the policy was adopted and consistently applied for sound educational

10 "In 1964, Board member Golightly (who is black) and the NAACP made such a proposal. It was argued that affording students an opportunity to choose to attend schools located outside their residential neighborhoods would lead to racial integration in the system's schools. The Board adopted the Open Transfer proposal upon the recommendation of the Committee on Equal Educational Opportunity, then chaired by member Story." (A.68)

reasons (A. 44, 102-107). There is no finding or evidence concerning statements by Board members or meeting minutes or reports which indicate that racial motivation played *any* role in decisions made.

(7) Although Board members testified at trial, there are no findings that racial motivation played a role in their decision making. Indeed, there is a specific finding that

> "[E]ven Board members inclined toward affirmative action to attain racial goals agree that the majority Board members' views and decisions to the contrary *were not motivated by any desire to discriminate against or otherwise 'shortchange' black students.* To the contrary, *the majority members had as their objective quality education for all.* From their point of view, quality education required adherence to the neighborhood school policy even though that policy necessitated the creation of segregated schools." (A.107) (emphasis added).

In addition, this Court in *Arlington Heights* makes clear that even if discriminatory intent were present in this case, the lower court conclusions are incorrect as a matter of law:

> "*Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision.* Such proof would, however, have shifted to the Village the burden of establishing *that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.* In such circumstances, there would be no justification for judicial interference with the challenged decision." 45 U.S.L.W. at 4078, n.21 (emphasis added).

See, also, Mt. Healthy City School District Board of Education v. Doyle, U.S. , 45 U.S.L.W. 4079 (U.S. Jan. 11, 1977).

Hence, even if the District Court could be deemed correct in concluding that a segregative intent was involved in certain actions of petitioners, there is no basis for judicial intervention in the Milwaukee school system; racial imbalance would have resulted in any event from the interaction of petitioners' uniform, consistent, good faith adherence to the neighborhood school policy and racial residential concentration.[11]

The Court of Appeals for the Seventh Circuit essentially held in *Arlington Heights*, 517 F.2d 409 (7th Cir. 1975), that the Village had a constitutional "affirmative duty" to desegregate housing in the Chicago metropolitan area. Although respondents' and the Seventh Circuit's rationale here is more subtle than in *Arlington Heights*, they seek to impose a similar "affirmative duty" in a school context.

III. RESPONDENTS FAIL TO REBUT PETITIONERS' ATTACK ON THE CIRCUIT COURT'S USE OF A PRESUMPTION OF CONSISTENCY AND THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW.

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11 Footnote 21 in *Arlington Heights* mandates a two-step analysis in cases involving allegations of discriminatory purpose. If proof that a governmental action was motivated in part by a racially discriminatory purpose is established in step 1, it triggers a shifting of the burden of explanation to the defendant. In the instant case, both lower courts found discriminatory purpose *as a result* of shifting the burden of explanation. The District Court applied a "constitutionally suspect" standard to decisions such as school siting, school renovations, etc., and then, because petitioners' decisions did not improve racial balance, inferred segregative intent. (A. 128-130).

The cases cited in footnote 11 of Respondents' Reply Brief miss the point of petitioners' attack on the presumption of consistency approach to appellate review. None of those decisions involved a claim that specific District Court findings were contrary to, and indeed precluded, the ultimate conclusion reached. In each of the cited cases, the appellate court instead merely filled a void in the findings; no appellate court interpreted the findings and record so as to negate specific findings as did the Circuit Court in this case.

Respondents likewise leave unexplained the mystery of how the Circuit Court can properly employ a "clearly erroneous" standard of review to affirm the ultimate conclusion of intentional segregation[12] while at the same time digging deep into the trial record[13] on a selective basis in an attempt to eliminate, *sub silentio*, findings inconsistent with both Courts' ultimate conclusion.

CONCLUSION

The decisions of the District and Circuit Courts subject the Milwaukee Public Schools to federal judicial intervention and control. Under prior decisions of this Court, that intervention and control are improper because a neighborhood school policy is not unconstitutional *per se*.

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12 "[W]e conclude that the District Court *was not clearly erroneous* in finding that defendants acted with the intent of maintaining racial isolation. While arguably no individual act carried unmistakable signs of racial purpose, *it was not unreasonable* to find a pattern clear enough to give rise to a permissible inference of segregative intent." (A. 20) (emphasis added).

13 *See, e.g.*, (A.10) (one board member's testimony concerning faculty staffing which was not elevated to a finding and is inconsistent with a specific finding – *see* Pet.27); (A.16) (testimony of an assistant superintendent concerning the open transfer program which was not elevated to a finding and which is also inconsistent with specific findings indicating that the program was adopted with racial balance improvement motivations – *see* Pet.28-29; A.8, 67, 68).

Petitioners have adhered in good faith to a neighborhood school policy since 1919. During the past quarter century, a doubling of overall student population and a rapid and extraordinary growth in black student population and residential density have necessitated a succession of difficult decisions. Through it all petitioners have maintained quality facilities, programs and staffs for all students, avoided double-shifts, provided compensatory education, coped with complex policy questions and yet have successfully preserved the deeply felt benefits of the neighborhood school policy. If the Equal Protection Clause is to be construed to require abandonment of neighborhood school policies adopted and pursued in good faith, then the pronouncement should issue only from this Court. The Petition for Certiorari should be granted.

Respectfully submitted,

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